STATE OF SOUTH CAROLINA

BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NO. 2018-319-E

IN THE MATTER OF: Application Duke Energy Carolinas, LLC For Adjustments in Electric Rate Schedules and Charges	)	**SOUTH CAROLINA ENERGY USERS COMMITTEE PETITION FOR REHEARING OR RECONSIDERATION**

The South Carolina Energy Users Committee ("SCEUC"), Intervenor in the above referenced proceeding, hereby petitions the South Carolina Public Service Commission ("Commission") for rehearing or reconsideration of Order No. 2019-323, dated May 21, 2019, granting Duke Energy Carolinas, LLC ("Duke") an increase in its electric rate schedules and charges. SCEUC petitions the Commission pursuant to S.C. Code Ann. §58-27-2150 (1976) and S.C. Code Ann. Reg. 103-854 to reconsider certain of its findings and conclusions with respect to the Commission's decision to raise Duke's rates. For the reasons hereinafter set out, SCEUC would respectfully submit that the Commission committed the following errors of fact and law.

PRECONSTRUCTION COSTS

1) In its application filed November 8, 2018, Duke sought recovery of $125 million in preconstruction costs with a return resulting from its abandoned Lee Nuclear Station project requesting a rate increase pursuant to S.C. Code Ann. Sections 58-27- 820 and 58-27-870. The preconstruction costs for which Duke now seeks recovery are not used and

useful to provide electricity. Duke elected to recover its nuclear plant preconstruction costs under S.C. Code Ann. Section 58-33-225 of the Base Load Review Act ("BLRA" or "Act"). The General Assembly has repealed the BLRA to prohibit Duke recovery of its preconstruction costs. Act 258, R287, H4375, Section 2.A

2) The nature of the proof required of Duke pursuant to S.C. Code Ann Section 58-33-225 and S.C. Code Ann. Sections 58-27-820 and 870 is inconsistent.[1] In enacting the BLRA, the General Assembly provided Duke with benefits not available under traditional forms of rate making such as provided in S.C. Code Ann. Sections 58-27-820 and 870. S.C. Code Ann. Sections 58-27-820 and 870 require Duke to invest hundreds of millions of dollars in nuclear construction before a prudency determination of its decision to construct the plants and subjects Duke to continuous litigation over the prudency issue. S.C. Code Ann. Section 58-33-225 provided Duke with the security of an upfront determination of prudency, sparing Duke the risk associated with the loss of hundreds of millions of dollars in nuclear investment.

3) In 2007, Duke elected to file its request under S.C. Code Ann. Section 58-33-225 for approval of its decision to incur preconstruction costs associated with its Lee Nuclear Station. *Carter v. Associated Petroleum Carriers*, 235 S.C. 80, 110 S.E.2d 8 (1959). By Order No. 2008-417 and Order No. 2011-454, the South Carolina Public Service Commission ("Commission") authorized Duke to incur the South Carolina allocable share of $350 million in preconstruction costs through June 30, 2012. By June 30, 2012, Duke

[1] The inconsistency does not lie in the remedies Duke has invoked, but in the different statements of fact and remediable rights asserted in the respective dockets. *White v. Livingston,* 234 S.C. 74, 79, 106 S.E.2d 892(1959)

had spent $251 million of the $350 million authorized by the Commission. Duke continues to comply with the terms of Order Nos. 2008-417 and 2011-454.

4) The General Assembly repealed S.C. Code Ann. Section 58-33-225 effective June 28, 2018. In repealing S.C. Code Ann. Section 58-33-225, the General Assembly intended to protect ratepayers from payment of nuclear capital costs that are not used and useful. *Duquesne Light Co. V. Barasch,* 488 U.S. 299 (1989); see also SCAG Opinion September 26, 2017 at pages 43-46. Duke concedes that it was prohibited from seeking recovery of its preconstruction costs pursuant to S.C. Code Ann Section 58-33-225(G) of the BLRA. (Fallon prefiled direct testimony, p. 25. Ll. 6-15). The Commission has overlooked and misapprehended that having elected to accept the benefits of the BLRA, Duke is estopped from now filing for recovery of its nuclear preconstruction costs pursuant to S.C. Code Ann. Sections 58-27-820 and 870 which require proof of a different statement of facts and remediable rights. *White v. Livingston,* 234 S.C. 74, 106 S.E.2d 892(1959); *Lawson v. Rogers*, 312 S.C. 492, 435 S.E.2d 853 (1993.

5) A cardinal rule of statutory construction requires the Commission to ascertain the intent of the General Assembly in its application of a statute. *South Carolina Energy Users Committee v. South Carolina Public Service Commission,* 388 S.C 486, 697 S.E.2d 587 (2010). Moreover, the Commission's application of that statute may not lead to an absurd result. *Hamm v. South Carolina Public Service Commission*, 287 S.C. 180, 336 S.E.2d 470(1985) holding that no matter how clear the language of a statute may be, the court will reject that meaning when it leads to an absurd result not possibly intended by the legislature; *Carolina Power & Light Company v. Town of Pageland*, 321 S.C. 538, 471 S.E.2d 137 (1996) holding that a statute will be given retroactive effect if to hold otherwise

would lead to a result so plainly absurd that it could not possibly have been intended by the legislature or would defeat the plain legislative intent.

6) The Commission has overlooked and misapprehended that the intent of the General Assembly in enacting Act 258, R287, H4375, Section 2.A was to deprive Duke recovery of its nuclear preconstruction costs entirely. The impact of the Commission Order No 2019-323 is to circumvent the repeal of the BLRA by allowing Duke to recover all of its nuclear preconstruction costs. The Commission overlooked and misapprehended that its application of Act 258, R287, H4375, 2.A leads to an absurd result not intended by the General Assembly.

7) The Commission overlooked and misapprehended that it had limited Duke's recovery under the BLRA to $60 million[2] and that by authorizing Duke recovery of $125 million from its South Carolina ratepayers, the Commission's construction of Act 258, R287, H4375, Section 2.A rewards Duke for its delay in seeking recovery of its nuclear preconstruction costs and undermines the authority to which the Commission's orders are entitled. The Commission's application of Act 258, R287, H4375, Section 2.A leads to an plainly absurd result not intended by the legislature.

8) The Commission overlooked and misapprehended the legislative history of Act 258, R287, H4375, Section 2.A which prohibits Duke recovery of its nuclear preconstruction costs. After the disastrous abandonment of the nuclear construction at the VC Summer site in Jenkinsville, South Carolina, both the House and Senate convened special committees to study the impact of the failure of the South Carolina utilities to construct nuclear plants on ratepayers (the Speaker of the House convened the bipartisan

"House Utility Ratepayer Protection Committee" to develop remedies to protect ratepayers from unnecessary costs). The House and Senate, after much consideration, enacted a number of bills which were designed to protect ratepayers from having to pay for unnecessary nuclear construction costs. The Commission overlooked and misapprehended the fact that, by authorizing Duke recovery of $125 million in nuclear preconstruction costs, twice that which was authorized under the BLRA, it has failed to protect ratepayers as was intended by Act 258, R287, H4375, Section 2.A.

9) The Commission overlooked and misapprehended the fact that reliance on thirty five year old precedent does not protect Duke's ratepayers. In relying upon Order No. 83-92 to authorize Duke recovery of $125 million in nuclear preconstruction costs, the Commission overlooked thirty five years of intervening precedent such as the passage of the BLRA, the adverse impact of imposing billions of dollars of costs upon South Carolina ratepayers for unbuilt nuclear plants under the BLRA, and the General Assembly's repeal of the BLRA to protect Duke's ratepayers. Thirty five year old order does not serve as authority for ignoring the intent of the General Assembly in enacting Act 258, R287, H4375, Section 2.A. to protect ratepayers from the cost for nuclear construction that is not used and useful.

10) The Commission overlooked and misapprehended the fact that by authorizing Duke recovery of $125 million in nuclear preconstruction costs, it rewarded the utility for its delay in seeking recovery of its costs. The Commission limited Duke to recovery of $350

[2] The parties concede that Duke spent $251 pursuant to its base load review orders. South Carolina's jurisdictional share is approximately $60 million.

million systemwide in nuclear construction costs by Order No. 2011-554, expressly limiting Duke to recovery of AFUDC incurred through June 30, 2012. Duke incurred $68 million in AFUDC by June 30, 2012. (Hearing Exhibit 19). By the time it filed for recovery of its nuclear preconstruction costs in 2018, Duke had booked $248 million in AFUDC (Fallon prefiled direct testimony, p. 27). Consequently, Duke was rewarded with an additional $180 million for its five year delay in seeking recovery of its nuclear preconstruction cost. The Commission overlooked and misapprehended the fact that the General Assembly never intended to reward Duke's delay in seeking recovery of its nuclear preconstruction costs under S.C. Code Ann Section 58-33-225(G), S.C. Code Ann. Sections 58-27-820 and 870 or Act 258, R287, H4375, Section 2.A. The Commission overlooked and misapprehended the fact that the rates authorized for recovery of AFUDC were not authorized by statute and are not just and reasonable.

11) The Petitioner requests that the Commission reconsider its order and to protect Duke's ratepayers, deny Duke recovery of $125 million in nuclear preconstruction costs.

COAL ASH COST RECOVERY AT WH LEE

12) Duke's total cost to ratepayers for excavating its WH Lee coal ash pond is expected to be $278.5 million, of which Duke sought to recover $98.5 million from ratepayers in this docket. ("Wittliff direct p. 39, Table 5.4") The WH Lee coal ash pond was located contiguous to the electric generating plant.

13) Duke acted to justify its excavation of its coal ash pond on a consent agreement voluntarily entered into with the South Carolina Division of Health and Environmental

Control ("DHEC"). (Consent Agreement 14-13-HW). Not wishing to look a gift horse in the mouth as ORS witness Wittliff explained, DHEC entered into a consent agreement with Duke to excavate the WH Lee coal ash pond.

14) It is undisputed that the WH Lee coal ash pond was not subject to regulation by either the Environmental Protection Agency's Coal Combustion Residual rule ("CCR") or the North Carolina Coal Ash Management Act or CAMA.

15) Consent Agreement 14-13-HW reflects that Duke was in compliance with its permit of the existing coal ash pond. The Findings of Fact in the consent agreement reveal no violations of DHEC regulations. There is no record of seeps or spills. There is no record of surface water or ground water contamination. (Consent Agreement 14-13-HW at p. 2).

16) At the time of its consent agreement with DHEC, Duke had completed two engineering studies of its WH Lee coal ash pond, neither of which recommended excavation. Duke's engineering firm Soils and Materials Engineers (S&ME) recommended on September 12, 2014 that Duke merely monitor its WH Lee coal ash pond. Subsequently, on June 30, 2015, nine months after the consent agreement, Duke's engineers URS found no coal as pond dam safety issues requiring immediate attention. (O'Donnell prefiled direct at page 40, l. 22 – p. 41, l.19).

17) In finding that Duke was compelled to follow DHEC guidance requiring the coal ash from the WH Lee station to be disposed of in Class 3 landfills, the Commission overlooked and misapprehended the fact that the WH Lee coal ash pond was located contiguous to the WH Lee electric generating unit and exempted from the requirement to be excavated and hauled to a Class 3 landfill pursuant to 2016 H.B. 4857, codified as S.C.

Code Ann. Section 58-27-255(A)(1).[3] Consequently, S.C. Code Ann. Section 58-27-255(A)(1) does not support the Commission's finding that DHEC had authority to mandate the coal ash excavation at WH Lee. To the contrary, 58-27-255(A)(1) compels the finding and conclusion that it was unnecessary to excavate the coal ash pond.

18) In addition, the Commission overlooked and misapprehended the fact that because the WH Lee coal ash pond met DHEC standards and was owned and operated by the utility that produced the electricity which resulted in the coal ash by product, DHEC had no authority to order Duke to remediate the coal ash pond. S.C. Code Ann. Section 58-27-255(A)(4) .

19) The Commission overlooked and misapprehended the fact that to take advantage of Duke's offer to excavate the coal ash pond, DHEC was forced to act by agreement, negotiated at arm's length. Consent Agreement 14-13-HW was the result of a negotiated process whereby the regulator was forced to agree to covenant not to sue. (Consent Agreement 14-13-HW at p. 8). Had DHEC been acting pursuant to its statutory authority to close the coal ash pond, a covenant not to sue would have been unnecessary. See S.C. Code Ann. § 44-96-450. In addition, because DHEC was not acting under its regulatory authority, DHEC was forced to include language in the consent order granting it authority to inspect the remediation performed at the site. Had DHEC been acting pursuant to its regulatory authority, it would have been able to rely upon S.C. Code Ann. § 44-96-260 (4) for authority to enter upon the coal ash pond and inspect for compliance with State law.

[3] H.B. 4857 relied upon by the Commission in its order was codified as S.C. Code Ann. Section 58-27-255. Duke witness Wright, a non-lawyer, mistakenly argued that H.B. 4857 passed in 2016 relied upon by the Commission at page 46 of provided the authority for DHEC to enter the consent agreement with Duke to excavate the WH Lee coal ash pond. Order No. 2019-323 at p. 46.

Instead, DHEC was forced to rely upon common law contractual concepts to accomplish the goal of closing the coal ash pond.

20) The Commission is charged with assessing the impact of a DHEC order on a utility's ratepayers and this Commission has exercised its authority to protect ratepayers from excessive measures imposed by DHEC. See Order No. 2004-203 in Docket No. 2003-218-S. Here, the Commission overlooked and misapprehended the fact that the existence of a DHEC consent agreement does not justify, much less compel, a decision by the Commission to require Duke's ratepayers to pay for the unnecessary excavation of the WH Lee coal ash pond.

21) The Commission overlooked and misapprehended the fact that the only reasonable inference from the record is that it was totally unnecessary to excavate the WH Lee coal ash pond, and that in closing the WH Lee coal ash pond, Duke acted imprudently. Forcing Duke's ratepayers to pay $278.5 for this unnecessary expense is incomprehensible to ratepayers.

22) The Petitioner requests that the Commission reconsider its order and deny Duke recovery of the cost of excavating the WH Lee coal ash basin.[4]

REAL TIME PRICING

23) The Commission overlooked and misapprehended the fact that because Duke prices its real time pricing ("RTP") rates at its own marginal costs, manufacturers are paying higher costs than necessary There are times when Duke's marginal cost of power offered to its manufacturing customers is greater than the price Duke could pay for that same

[4] SCEUC concurs with the Commission order which protects South Carolina ratepayers by disallowing $469,894,472 in CAMA-only costs.

power in the open wholesale market. In addition, when Duke fails to take advantage of lower cost power on the wholesale market, it is also needlessly running its higher cost generating plants adding to higher fuel costs paid by all consumers. (O'Donnell prefiled direct at p. 50, l. 29 – p.51, l. 13).

24) The Commission overlooked and misapprehended the significant impact Duke's RTP rates have on Duke's manufacturing customers. A manufacturer with a 20 MW load in Duke's territory would have paid an additional $2.5 million for electricity, excluding transmission costs, than had the manufacturer purchased that same power from the Dominion Hub. (O'Donnell prefiled direct p. 53, ll. 1-8)

25) The Commission overlooked and misapprehended the fact that RTP costs designed to create a competitive manufacturing marketplace in South Carolina as proposed by SCEUC witness O'Donnell are just and reasonable.

26) The petitioner requests that the Commission reconsider its order and require Duke to provide real time pricing rates at the lowest cost practicable without prejudicing Duke ratepayers and shareholders by fixing RTP rates which are competitive in the market and reduce the costs to manufacturers

CONCLUSION

For the foregoing reasons, as well as those set out at trial and in its brief to the Commission submitted April 25, 2019, the South Carolina Energy Users Committee respectfully requests that the Commission rehear those issues set out above, reconsider its Order No. 2019-323 respecting those issues and issue its order consistent with the arguments set out above.

Respectfully submitted,

Scott Elliott, Esquire
ELLIOTT & ELLIOTT, P.A.
1508 Lady Street
Columbia, SC 29201
(803) 771-0555

Attorney for the South Carolina Energy Users Committee

Columbia, South Carolina
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